

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH STEWART

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 211361

Wayne Circuit Court

Criminal Division

LC No. 97-005987

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged of first-degree murder, MCL 750.316, and was sentenced to the mandatory term of life imprisonment without parole. He appeals as of right and we affirm.

Defendant's conviction arises from the shooting death of Terrance Black. The shooting occurred between 11:00 a.m. and 12:00 noon on April 22, 1996. The two key prosecution witnesses were Robert Simpson and Ramone McBurroughs. Simpson testified that, shortly before the shooting, defendant told him that he was going to kill Black. McBurroughs testified that he was a back seat passenger in defendant's car when defendant pulled alongside Black's vehicle and shot the decedent.

I

We first address defendant's claims regarding ineffective assistance of counsel.

Following trial, defendant moved for a judgment notwithstanding the verdict or a new trial based on trial counsel's alleged conflict of interest in representing Ronald Johnson¹ and based on trial counsel's failure to call certain witnesses. The trial court denied the motion, but did not conduct an evidentiary hearing concerning the conflict of interest or ineffective assistance of counsel claims.² Defendant contended in his appellate brief that trial counsel was ineffective

¹ Johnson was allegedly a front-seat passenger with defendant in the vehicle when Black was shot. Johnson was initially arrested and charged with first-degree murder for Black's shooting death. However, Johnson's case was dismissed following his preliminary examination.

² We note that, after defendant filed his claim of appeal on April 28, 1998, he filed a motion to
(continued...)

for failing to call two alibi witnesses (Gerald Hill and William Foster) because of a defective alibi notice, for failing to call Ronald Johnson who would have refuted McBurroughs' testimony, for failing to call Anthony Gardner, an alleged witness to the incident, and because counsel previously represented codefendant Johnson without obtaining a valid waiver from defendant. Based on these claims and the lack of an evidentiary record, we remanded this case to the trial court for an evidentiary hearing in an unpublished order entered on December 20, 2000. The hearing was held on March 9, 2001, May 11, 2001, and June 14, 2001. The trial court rendered its decision on the record on July 20, 2001, and denied defendant's motion for a new trial based on his claim of ineffective assistance of counsel.

For defendant to establish the claim that he was denied the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this deficiency was so prejudicial that defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Regarding deficient performance, defendant must overcome the presumption that counsel's actions constituted sound trial strategy under the circumstances. *Id.* To show prejudice, defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 302-303.

In his supplemental brief filed after the evidentiary hearing, defendant first claims that he was denied the effective assistance of counsel because trial counsel, who previously represented Ronald Johnson, subsequently represented defendant without a valid waiver of his right to separate counsel.

At the evidentiary hearing, counsel testified that she represented codefendant Ronald Johnson at the time that Johnson had been charged with murdering the victim Terrence Black. The charges against Johnson was dismissed following the preliminary examination, held on November 8, 1996, on the prosecution's motion. The charges against Johnson had been dismissed before the present charges were brought against defendant.³ We find that this case does not present an instance of "joint representation" under MCR 6.005(F). Joint representation under MCR 6.005(F) occurs when a lawyer represents two or more defendants who are "jointly charged with an offense or offenses or their cases are otherwise joined." *People v Charles R. Clark*, 106 Mich App 771, 773; 308 NW2d 639 (1981). Under the court rule, "the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer." MCR 6.005(F). To allow joint representation,

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remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), on August 12, 1999. This Court denied the motion to remand because it was not timely filed, because of the failure to demonstrate that the issues should be decided initially by the trial court, and because of the failure to demonstrate by affidavit or an offer of proof the facts to be established at the hearing, in an unpublished order dated September 1, 1999.

³ We note in this regard that the killing occurred on April 22, 1996, defendant was arrested on July 21, 1997, and was arraigned on July 22, 1997. Counsel entered her appearance as retained counsel on August 29, 1997, although she did represent him at the preliminary examination held on August 11, 1997.

the defendants must state that “they desire to proceed with the same lawyer.” MCR 6.005(F)(2). Here, defendant and Johnson were neither jointly charged nor were their cases joined. Thus, because there was no joint representation, the waiver rule requiring defendant to consent to trial counsel’s representation was not triggered.

Nevertheless, defendant also argues that he was denied the effective assistance of counsel because trial counsel did not call Johnson to testify on his behalf because of a conflict of interest. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). To demonstrate ineffective assistance of counsel as a result of a conflict of interest, defendant is required to show that an actual conflict of interest adversely affected counsel’s performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Despite a subpoena, Johnson did not appear to testify at the evidentiary hearing. As noted by the trial court, there is no way of knowing what Johnson’s testimony might have been since he did not appear for the hearing. Moreover, defendant admitted at the hearing that he did not know how Johnson would have testified at trial even if he had been called. Indeed, the prosecutor noted at the hearing that Johnson probably would have invoked his Fifth Amendment right to not testify had he been called at trial. Counsel also testified at the hearing that she talked with Johnson about his potential testimony before trial.

Under these circumstances, we find that defendant has failed to meet his burden of demonstrating ineffective assistance of counsel. Defendant has failed to show that Johnson would have offered any exculpatory testimony on his behalf at trial. Consequently, defendant has failed to prove the factual predicate for his claim of ineffective assistance of counsel in this regard. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that he was denied the effective assistance of counsel because he was not allowed to present the testimony of two alibi witnesses, Gerald Hill and William Foster, because of trial counsel’s error in failing to properly file a notice of alibi. These two additional alibi witnesses presented affidavits corroborating Neil Zeigler’s⁴ testimony at trial that defendant was out of the state at the time of the shooting. At the evidentiary hearing, Hill and Foster testified in the same manner that Zeigler testified at trial concerning the alibi defense.

At the hearing, counsel stated that she filed the alibi notice, including all three witnesses, but the trial court did not permit her to call Hill and Foster because the alibi notice was defective in that it did not specify that the witnesses were all in Atlanta, Georgia at the time of the shooting. See MCL 768.20(1). Counsel contended that the notice was filed as she normally files them and that she did not previously have a problem with filing them in the manner that she did. Further, counsel had all three witnesses at court to testify; however, the trial court allowed only Zeigler to testify. Even if there was error in the filing of the alibi notice, we find that defendant

⁴ Despite the fact that trial counsel failed to properly file a notice of alibi, the trial court permitted trial counsel to present Zeigler as an alibi witness at trial, apparently because Zeigler was in court and prepared to testify. The trial court did not permit trial counsel to have Hill and Foster testify because the notice of alibi had been violated and trial counsel also stated that “Mr. Zeigler [is] the only one that is here today and we may just conclude with his testimony.”

was not prejudiced because he was allowed to present Zeigler's testimony. The evidentiary hearing indicates that Hill and Foster would have testified in exactly the same manner as Zeigler, therefore, the evidence was merely cumulative. Therefore, we conclude that defendant has not shown that the failure to present Hill and Foster as alibi witnesses was prejudicial because there is not a reasonable probability that the outcome of the trial would have been any different since the testimony of Hill and Foster would not have differed from Zeigler's testimony.

Defendant further argues that counsel was ineffective for failing to call Delshawn Williams as a witness, who would have impeached Robert Simpson's testimony. Simpson testified at trial that defendant had been at Williams' house shortly before the shooting and that defendant stated that he was going to kill Black. At the evidentiary hearing, Williams testified that he learned about Simpson's testimony after the trial. Williams testified at the hearing that Simpson was never at his house on April 22, 1996, and that he did not see defendant on that day. Williams claimed that he was at home all day because he had a sprained ankle. Significantly, Williams testified that he did not testify at trial because he was "neutral" and did not want to get involved since he knew all of the parties. He stated that he did not want to come forward and that no one involved went to him to ask him to testify.

We agree with the trial court that counsel was not ineffective for not calling Williams as a witness because Williams stated that he did not come forward as a witness and did not want to be involved. Counsel cannot be faulted where the potential witness clearly did not want to be involved in the case and did not come forward with any testimony. Therefore, defendant has not shown that counsel was deficient for not calling Williams as a witness at trial.

Defendant further contends that counsel was ineffective for failing to call Juan Miteo as a witness. Miteo, a lawyer, had met defendant once or twice when defendant approached him about representing him in a murder case. Miteo was provided with some police reports and defendant went to his office with a young African-American man in a wheelchair. Miteo could not recall the man's name and did not have any notes regarding his interview with this man. The man did offer some exculpatory evidence on defendant's behalf. Miteo had conversations with defendant's counsel before trial, but he told counsel that he did not have any notes and could only offer hearsay testimony that the man had been to his office to offer some hearsay testimony, although Miteo informed counsel that he had some concerns about the man's testimony. At the hearing, counsel stated that after discussing this with Miteo, she determined that Miteo would not have provided any exculpatory evidence and that she specifically discussed this with defendant before trial.

Under these circumstances, counsel was not deficient for not calling Miteo as a witness at trial. It is clear that he would not have offered any testimony that would have favored defendant and counsel clearly made a strategic trial decision in this regard.

Accordingly, we conclude that defendant has not shown that he was deprived of the effective assistance of counsel at trial.

II

Defendant also argues that the trial court abused its discretion when it barred the defense from calling two alibi witnesses. Defense counsel failed to file a notice of alibi statement specifying where defendant claimed to be when the offense was committed and, therefore, failed to comply with the alibi notice statute. MCL 768.20(1). Nevertheless, the trial court permitted defendant to present the testimony of alibi witness Neil Zeigler, who claimed that he, William Foster, Gerald Hill, and defendant had all driven to Atlanta, Georgia, on April 19, 1996, and did not return to Detroit until the afternoon of April 22, 1996. Under the circumstances, the trial court's decision to allow defendant to present Zeigler's testimony, but not the testimony of the other two alibi witnesses in light of defense counsel's failure to comply with the alibi witness statute, was not an abuse of discretion. *People v Travis*, 443 Mich 668, 677-680; 505 NW2d 563 (1993).

III

Defendant also claims that the trial court abused its discretion when it denied his request to recall McBurroughs on the final day of trial for further cross-examination. We review the trial court's decision for an abuse of discretion. *Potts v Shepard Marine*, 151 Mich App 19, 26; 391 NW2d 357 (1986); *People v Raetz*, 15 Mich App 404, 406; 166 NW2d 479 (1968). As in *Raetz* and *Potts*, defendant here had two prior opportunities to cross-examine the witness. Further, before excusing McBurroughs as a witness, the trial court informed the parties that, because of the witness' physical difficulties, he would not be required to remain on a continuing subpoena and the parties "should ask all the questions they intend to ask" because the court was "canceling the subpoena." Under the circumstances, the trial court did not abuse its discretion in denying defendant's subsequent request to recall the witness.

IV

Next, defendant claims that he was denied a fair trial because of judicial misconduct. Because defendant did not object to the alleged misconduct at trial, this issue is not preserved, although we may consider the issue to the extent necessary to avoid manifest injustice. *People v Sharbnaw*, 174 Mich App 94, 99; 435 NW2d 772 (1989). Our review of the record convinces us that the trial court was not biased, unfair, or partial. *People v Conyers*, 194 Mich App 395; 487 NW2d 787 (1992); *People v Moore*, 161 Mich App 615, 616-617; 411 NW2d 797 (1987). The record does not factually support defendant's claims that the trial court allowed prejudicial and irrelevant information into evidence, that it made improper comments discrediting defendant's alibi defense, or that the jury instructions unfairly left the jury with no option but to convict defendant. Further, it was not an abuse of discretion to order defendant to be handcuffed to his chair after he became belligerent and disruptive in the courtroom, and shouting profanities at the trial court. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994); *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

V

Defendant also claims that he was denied a fair trial on the basis of prosecutorial misconduct. Because defendant failed to object to any of the alleged instances of prosecutorial

misconduct, we review defendant's claim for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720-722; 613 NW2d 370 (2000).

The record does not support defendant's claim that the prosecutor shifted the burden of proof during jury voir dire. Although the prosecutor suggested in his example to the jury that even a guilty person must be presumed innocent, the prosecutor went on to state that the burden of proving that a defendant committed the charged crime was "the responsibility of the prosecutor." Further, the trial court reminded the jury during trial that the prosecution had the burden of proving defendant guilty beyond a reasonable doubt and properly instructed the jury on this issue.

Defendant also argues that the prosecutor improperly vouched for the credibility of witnesses during closing and rebuttal arguments. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Viewed in context, the prosecutor did not vouch for the credibility of Darwin Green when, in reference to the circumstances surrounding Green's testimony, he remarked that a pertinent portion of Green's testimony had "a ring of truth to it." Regardless, even if the prosecutor's remarks could be construed as improper vouching, because Green's testimony did not implicate defendant in the shooting and was consistent with defendant's alibi defense, defendant has not shown that any error affected his substantial rights.

Although the prosecutor may have improperly vouched for the testimony of Robert Simpson by remarking that "he's telling the truth" when commenting on Simpson's claim that he did not know the exact time when defendant left the house on Sussex, that matter was of little import in the context of the trial, given defendant's defense that he was out of the state at the time. Further, a curative instruction could have cured any error upon timely request. Thus, the remark did not affect defendant's substantial rights.

Next, there is no merit to defendant's claim that the prosecutor argued a fact not in evidence during rebuttal closing argument when he suggested that defendant was in the car at the time of the shooting. The remark was supported by the testimony of the prosecution's chief witness, who claimed that defendant was in the car and shot the decedent. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985).

Finally, defendant has failed to show plain error affecting his substantial rights when the prosecutor made a fleeting reference to the two alibi witnesses who were not called during his cross-examination of Neil Zeigler.

VI

Defendant next claims that the jury verdict was against the great weight of the evidence. MCR 2.611(A)(1)(e). Defendant's argument rests upon an attack on the credibility of McBurroughs and Simpson. Because the issue of witness credibility is for the jury to decide, we decline to set aside the jury verdict on this basis. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998).

VII

Lastly, defendant argues that the trial court abused its discretion when it denied defendant's motion for a mistrial based on the jurors' exposure to outside influences. After the jury was impaneled, a disturbance erupted in the hallway, outside the courtroom, where members of the victim's family allegedly made remarks, in the presence of members of the jury, that defendant had killed the decedent. The record indicates that the trial court inquired of the members of the jury panel whether the disturbance had affected their ability to be fair and impartial. Further, the trial court instructed the jurors to disregard the outburst and to render its verdict on the basis of the evidence presented at the trial. Under the circumstances, we conclude that the trial court did not abuse its discretion when it determined that the jury could render an impartial verdict in the case and, therefore, denied defendant's motion for a mistrial. *People v Johnson*, 103 Mich App 825, 929-830; 303 NW2d 908 (1981).

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell